

SERVICE DATE – SEPTEMBER 15, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 729

OFFERS OF FINANCIAL ASSISTANCE

Digest:¹ The Board grants a motion to strike certain information, which was submitted in this proceeding in violation of a protective order in a separate Board proceeding.

Decided: September 13, 2016

On December 7, 2015, the Surface Transportation Board (Board) issued an advance notice of proposed rulemaking (ANPRM) seeking comment on whether and how it should update its rules pertaining to offers of financial assistance in order to improve that process and protect it against abuse. Comments on the ANPRM were due February 12, 2016. Reply comments were due March 14, 2016.

On February 16, 2016, James Riffin (Riffin) submitted a motion for protective order and a proposed protective order, along with public and confidential versions of his comments on the ANPRM. Riffin stated in his motion that he sought to make available to the Board confidential information including tonnage and number of rail cars that an alleged prospective shipper in Consolidated Rail Corp.—Abandonment Exemption—in Hudson County, N.J. (Conrail Abandonment), Docket No. AB 167 (Sub-No. 1189X) et al., proposes to ship. (Riffin Mot. for Protective Order 1.) In a decision served March 10, 2016, the Board granted Riffin’s motion for protective order and adopted a protective order and undertakings in this docket.

On March 14, 2016, the City of Jersey City filed a motion to strike Riffin’s confidential comments, arguing that the confidential information Riffin submitted in this docket was obtained subject to the protective order in Conrail Abandonment and thus was filed in this proceeding in violation of the protective order in that case. (Jersey City Mot. to Strike 1-2.) Riffin did not reply to Jersey City’s motion.

The protective order in place in Conrail Abandonment provides that confidential information submitted subject to that protective order “(s)hall be used solely for the purpose of

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

filing or preparing to file an Offer of Financial Assistance in connection with this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.” Consol. Rail Corp.—Aban. Exemption—in Hudson Cty., N.J., AB 167 (Sub-No. 1189X), app. at 1 (STB served Sept. 24, 2014). The Conrail Abandonment protective order does not permit confidential information submitted in that docket to be used in other proceedings before the Board. It does provide, however, that “(i) nformation that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Protective Order even if the same information is produced and designated as ‘CONFIDENTIAL’ or ‘HIGHLY CONFIDENTIAL’ in this proceeding.” Consol. Rail Corp., AB 167 (Sub-No. 1189X), app. at 3.

The case before the Board in Docket No. EP 729 is not related to an offer of financial assistance in Conrail Abandonment, nor is it related to any judicial review of any decision in that case. Additionally, the Board does not have any evidence that the confidential information submitted by Riffin in this docket is publicly available or was otherwise obtained outside of Conrail Abandonment, or any evidence rebutting Jersey City’s statements that this information was obtained subject to the protective order in Conrail Abandonment. It thus appears that the information submitted by Riffin here was submitted in violation of the protective order in Conrail Abandonment. The Board will therefore grant Jersey City’s motion to strike that confidential information from the record in this docket.

Jersey City also questions whether the Board intended its protective order in this docket to amend or modify the protective order in Conrail Abandonment, to allow parties to use confidential information from the Conrail Abandonment proceeding in this proceeding. Jersey City claims this would be improper, as it would deprive the parties in Conrail Abandonment of the opportunity to respond to the change to that protective order. Jersey City also argues that the protective order here is problematic, in that it purports to allow confidential information from Conrail Abandonment to be used only in this docket, but not in Conrail Abandonment itself. (Jersey City Mot. to Strike 2-3.)

The Board clarifies here that the protective order in place here does not amend or modify the protective order in Conrail Abandonment or in any other proceeding. The Board also clarifies that the protective order here does not restrict use of confidential information from Conrail Abandonment to use only in this docket, as such an outcome would be illogical. The protective order in place here applies only to confidential information properly submitted in this proceeding.

It is ordered:

1. Jersey City's motion to strike is granted, and the confidential information contained in Riffin's comments is hereby stricken.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.